UNITED STATES v. RICHARD S. ARBO

IBLA 80-671 Decided January 25, 1983

Appeal from decision of Administrative Law Judge John R. Rampton, Jr., declaring the Masson placer mining claim null and void. CA 5112.

Affirmed.

1. Mining Claims: Contests

When the Government contests the validity of a mining claim on the basis of lack of discovery of a valuable mineral deposit, it has the burden of going forward with sufficient evidence to establish a prima facie case as to that charge; however, the mining claimant has the ultimate burden of refuting the Government's case by a preponderance of evidence.

2. Mining Claims: Discovery: Generally

Mineralization that only warrants further prospecting or exploration in an effort to ascertain whether sufficient mineralization might be found to justify mining or development does not constitute a valuable mineral deposit, i.e., a valuable mineral deposit has not been found simply because the facts might warrant a search for such a deposit.

3. Mining Claims: Determination of Validity -- Mining Claims: Discovery: Generally

A discovery of a valuable mineral deposit does not exist where the available evidence is of such a character that a person of ordinary prudence would only be

justified in conducting further exploration of the claims before making a commitment to develop a profitable mine. There must be physically exposed within the limits of the claim the vein or lode bearing mineral of such quality and such quantity as to justify the expenditure of money for development of a mine and the extraction of the mineral.

4. Administrative Procedure: Hearings -- Evidence: Generally -- Evidence: Admissibility -- Evidence: Hearsay -- Hearings -- Mining Claims: Hearings -- Rules of Practice: Evidence

Where an Administrative Law Judge found that there was sufficient evidence of the reliability of assay certificates to justify the chief expert witness' acceptance and consideration thereof in forming his opinion, as is the recognized custom among geologists and mining engineers, no error was committed in overruling objections to admission in evidence of the assay certificates. Material, relevant hearsay is admissible in administrative proceedings.

APPEARANCES: Mark E. Merin, Esq., Sacramento, California, for appellant; Charles F. Lawrence, Esq., Office of the General Counsel, U.S. Department of Agriculture, San Francisco, California, for the U.S. Forest Service.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

Richard S. Arbo has appealed the April 29, 1980, decision by Administrative Law Judge John R. Rampton, Jr., declaring the Masson placer mining claim in sec. 35, T. 8 N., R. 7 E., Humboldt meridian, Trinity County, California, null and void for lack of discovery of valuable minerals on the claim.

The California State Office, Bureau of Land Management (BLM), instituted Contest No. CA 5112 on behalf of the United States Forest Service, Department of Agriculture. The complaint charged that there was no discovery of a valuable mineral on the claim, that the land within the claim was nonmineral in character and that it was not held in good faith for mining purposes.

Contestee (appellant herein) denied the charges and on October 17, 1979, a hearing was held before Judge Rampton in Redding, California.

Having reviewed the evidence the Judge found that the Government presented a prima facie case of no discovery, which was not rebutted by appellant. Accordingly, he declared the Masson placer mining claim void.

In the statement of reasons, appellant asserts that the mineral examiners improperly refused to take samples from the river bottom employing appellant's small dredge. Appellant points out that the Government's chief witness, mineral examiner, Robert W. Manchester, explained his refusal to sample the river bottom by asserting that there could be no definable deposit in the bottom. Appellant suggests that the Government's prima facie case was based solely on the examiner's opinion that no gold could be found on the river bottom and that the Judge erred in declaring the claim invalid based on this opinion.

Appellant further asserts that the Government's assay reports did not constitute probative evidence because the assayer was not produced as a witness.

Finally, appellant argues that the evidence shows he found substantial amounts of gold which were extracted from the river bottom by dredge.

Having reviewed the record, we summarize the testimony and exhibits of the parties.

The Government's mineral examiner, Robert W. Manchester, examined the claim on September 8, 1977, in the company of other Government mineral examiners (Tr. 26). He testified that here was nothing exposed for sampling at the sites indicated by appellant (stakes with small flags in the ground). The examiner assumed that bedrock would have been 10 to 15 feet below these sites. He stated that it took extensive work to prepare a site so undisturbed material could be obtained (Tr. 30-32). Consequently, the examiners selected their own sites for sampling. One of these was "25 feet from the discovery post." A second was taken in an area of old workings "where there were flags on sticks denoting the place where the claimant wanted a sample taken" (Tr. 38). A third sample was taken in a lower gravel bar at the river's edge (Tr. 40). Samples were logged and delivered to assay laboratories in San Francisco (Tr. 45). Government exhibits 9 and 10 are the assay reports, the gold values of which were analyzed by the examiner in terms of market value, labor costs, accessibility of the claim, and geological structure (Tr. 65-76). The examiner stated that the only recent mining activity he saw was a small suction dredge in the river (Tr. 82-83). He conceded that he "may have been asked" by Mr. Arbo to take samples using the dredge (Tr. 102), but that he took none because "there was no definable deposit in the river" (Tr. 100). Based on geologic analysis and inference, the examiner gave his opinion that recovering gold from the river would not be profitable. He testified:

> WITNESS: Well, actually, there's no deposit that is defined in the river itself. But right at the river's edge, if you had a gravel, that is something that you could define. If you wanted to project that all over the river, you can, and I have done that. It's not reliable from the standpoint of there's no way of telling if there is a deposit there or not until you mine it.

(Tr. 78). Based on his examination of the claim and the assay reports, the examiner testified that a prudent man would not be justified in expending labor and means in the hope of developing a paying mine. A second Government

witness, Michael Owens, assisted Manchester in sampling the claim. Owens' testimony wholly corroborates that of Manchester (see Tr. 272-76).

Appellant Richard Arbo testified that he requested the Government examiners to take samples using the dredge, but that they refused to do so (Tr. 135). He said that he took samples from the undercurrent by dredge (Tr. 150), that he had sold "many pounds" of gold from the claim to various individuals (Tr. 154). Appellant's exhibit E is a receipt of the Anaheim Metal Company indicating that an entity known as Sailor Bar Creek Mines had sent in 12-1/2 pounds of material for refining. Appellant stated that he had sent in the material (Tr. 155).

Appellant's exhibit F is an invoice dated November 20, 1978, from Anaheim Metal Company indicating a total amount due of $40,226.04 for 201.09 ounces of gold. Appellant testified that he had obtained the gold shown on the invoice from the claim at issue and had sold it to Sardi Corporation, which he identified as "a corporation down south that I used to * * * be tied up with" (Tr. 172). Exhibit G is another invoice from Anaheim Metal Company addressed to Sailor Bar Creek Mines indicating payment of $1,368.30 for 6 ounces of gold (Tr. 156).

Exhibit I is a report by geologist Bert White entitled "Sailor Bar Creek Mines Test Report, New River Basin, Masson Claim" which indicates that White's examination of the claim was completed on September 10, 1977. Testifying with respect to this report, appellant stated that White had sampled the same points sampled by Manchester and that he also sampled the dredge (Tr. 207, 219). Appellant said that he accepted the findings of the White report (Tr. 206, 214), the gold values of which were lower than the Government's assay values (see also Tr. 281). The concluding paragraph of the White report states as follows:

> Neither the U.S. Forest Service sampling program nor my own sampling program can be used to formulate the economic framework of the placer claims in the Denny area. Both programs can, and do answer the question: Is there a valuable placer mineral present? The answer to that question is: Yes! Furthermore, in my opinion, based on historical facts regarding the tenor of gold placers worldwide, there is sufficient gold present in those Denny placers examined by me, to justify the continued expenditure of time, effort, and money in the search for the fabled "Golden Fleece".

Appellant stated that he had about six other claims within a 10-mile vicinity of the Masson claim and that in several years he had produced probably about "$65,000 or $70,000" worth of gold from these claims (Tr. 176). He estimated that $45,000 to $50,000 of this was recovered from the Masson claim (Tr. 181, 194). He could not, however, give definitive information concerning the amount of gold recovered from the claim, his expenses incurred in recovering the gold, or the income realized therefrom. 1/ The witness

1/ The following excerpt from the record contains appellant's response on these points:

also declined to answer questions relating to his income tax returns for the years 1977-78 (Tr. 241-42), and was reluctant to produce his books and records for the purpose of providing more specific information of his mining operations. Appellant's counsel stated: "But I think that we would be going far afield if we drag in records relating to Mr. Arbo's entire operation and I don't think that it's necessary to resolve the issues in this case, which is the legitimacy of this claim" (Tr. 204).

[1] When the Government contests a mining claim, it is required to produce sufficient evidence to establish a prima facie case against the validity of the claim, and the burden of proof then shifts to the contestees to overcome this showing by a preponderance of the evidence. United States

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"Q Well, do you have any recollection at the moment of how much receipts you had from gold from the Masson Claim in 1977?

A Well, I know of about five people that I sold gold from at that time. Mr. Eckenberger out of Willow Creek. He bought, I think, in the neighborhood of four or five thousand dollars that year. Duane Hereford bought several thousand dollars, but I don't recall now.

Q Well, can you add them up -- give an approximation of your receipts? A I don't know what it was. It covered expenses, I know that.

Q Do you know what the receipts were?

A I got it written down in my book at home, but I don't have the book in front of me. I'd have to go to the bookkeepers office and get --

Q It did cover your expenses; is that correct?

A Oh, yeah.

Q Very well.

A Plus a profit.

Q And your expenses were determinable by multiplying eight times six, times five-fifty, times the number of months.

A Plus gas and plus oil, plus insurances --

Q And that's something on the order of ten or twenty thousand dollars; was it not?

A It would probably be in that neighborhood, I'm sure.

Q And that's '77?

A We're talking about '77 now. That's what you said.

Q Now, in '78, what were your receipts from gold -- gold sales from the Masson Claim?

A Probably -- ah -- maybe a couple -- three hundred ounces. In that neighborhood.

Q Mm-hmm.

JUDGE: 'A couple of three hundred ounces'?

WITNESS: Couple ah three Couple ah hundred. Two hundred fifty. Somewhere in that neighborhood.

JUDGE: Can't you be a little more specific than that?

WITNESS: Well, all I've got is what I've got in front of me, your Honor. I can't be any more specific than that because I don't have any more, you know, to be accurate with. I don't have my records in front of me is what I'm saying. You know? That's what I'm saying. Because I got one here for two hundred and some-odd ounces. I don't have any more with me." (Tr. 194-96).

v. Springer, 491 F.2d 239, 242 (9th Cir.), cert. denied, 419 U.S. 834 (1974); Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959). A prima facie case has been made when a Government mineral examiner testifies that he has examined the claims and found the evidence of mineralization insufficient to support a finding of discovery. United States v. Knecht, 39 IBLA 8 (1979); United States v. Bechthold, 25 IBLA 77 (1976).

We conclude that Manchester's corroborated testimony and the Government exhibits were sufficient to establish a prima facie case of invalidity. Appellant's contention that the Judge's holding was based on the examiner's opinion that no definable deposit existed in the river is not correct. The Judge's decision sets out in detail the sampling activities as performed and related by Manchester, the gold values obtained, and the conclusions drawn by the mineral examiner. A thorough reading of the decision indicates that the Judge's conclusion as to invalidity properly appears to have been based on the negative results of the sampling rather than Manchester's opinion that the river contained no definable deposit.

[2] The Government's case is buttressed, moreover, by the White report which appellant endorsed in his testimony. Appellant himself stated that White sampled using the dredge. The report, however, does not extol any values which may have been so obtained. As previously indicated, the gold values of the White report are lower than those obtained by the Government. White's conclusion (quoted above) expresses an often-cited principle of mining law. That principle is that mineralization which may warrant further exploration or prospecting in an effort to ascertain whether sufficient mineralization might be found to justify mining or development does not constitute a valuable mineral deposit. That is, a valuable mineral deposit has not been discovered because a search for such a deposit might be indicated. Converse v. Udall, 399 F.2d 616 (9th Cir. 1968), cert. denied, 393 U.S. 1025 (1969); Henault Mining Co. v. Tysk, 419 F.2d 766 (9th Cir. 1969), cert. denied, 398 U.S. 950 (1970).

[3] Having concluded that a prima facie case was presented, the issue becomes whether the evidence adduced by appellant preponderated over the showing made by the Government.

The validity of a mining claim depends on the discovery of a valuable mineral deposit. See 30 U.S.C. § 22 (1976). Such a discovery exists where "minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a profitable mine." Castle v. Womble, 19 L.D. 455, 457 (1894), approved, Chrisman v. Miller, 197 U.S. 313 (1905). Appellant's evidence does not allow the conclusion that a valuable mineral deposit has been discovered on the claim. First, the emphasis appellant has placed upon the presence of gold in the river bottom, upon his dredge sampling or mining, is considerably diluted when viewed in light of the White report. The statements that he sold "many pounds" of gold, that he produced tens of thousands of dollars worth of gold, and his Anaheim invoices were never linked to the costs of extraction and labor costs. Appellant's vague, speculative, and unsupported statements on these points do not allow the reviewer to formulate even a basic financial picture of his mining operations. Additional doubt is cast by appellant's

reluctance to bring pertinent records to the hearing, and his hesitancy to avail himself of the opportunity to supplement the record and clarify crucial elements of his case. 2/ In a mineral contest, the contestee must prevail, if at all, upon the strength of his own, not upon any weakness of the Government's case. United States v. Noyce, 59 IBLA 268 (1981). Appellant has not met this burden.

[4] Finally, we turn to appellant's objection to the assay results on the ground that the assayer was not present at the hearing and subject to cross-examination. Judge Rampton found that there was sufficient evidence of the reliability of the assay certificates which justified the chief expert witness' acceptance and consideration of the documents in forming his opinion according to the recognized custom among geologists and mining engineers. Brown v. United States, 375 F.2d 310 (D.C. Cir. 1967); see also Federal Rules of Evidence, R. 703. Material, relevant hearsay evidence is admissible in administrative proceedings. 5 U.S.C. § 556(d) (1976); Casey Ranches, 14 IBLA 48, 80 I.D. 777 (1973). United States v. Clemans, 45 IBLA 64 (1980).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Gail M. Frazier
Administrative Judge

I concur:

Douglas E. Henriques
Administrative Judge

2/ The possibility of a continuance, to allow appellant to submit his records in verification of his allegations, was discussed at the hearing (see Tr. 200-04).

ADMINISTRATIVE JUDGE HARRIS CONCURRING IN THE RESULT:

I am in agreement that appellant's claim was properly declared null and void by the Administrative Law Judge, and I am in agreement with much of the discussion in the main opinion. However, I believe that if appellant had made a timely motion to dismiss the case following the Government's presentation of evidence on the basis that the Government failed to present a prima facie case and had rested, the motion should have been granted and the contest dismissed. See United States v. Taylor, 19 IBLA 9, 23, 82 I.D. 68, 73 (1975). The basis for this belief is the failure of the Government mineral examiner to take samples using appellant's dredge, as requested by appellant (Tr. 135). The mineral examiner conceded that he "may have been asked" to take such samples (Tr. 102). He explained that he took none because "there is no definable deposit in the river" (Tr. 100).

In United States v. Williams, 65 IBLA 346 (1982), we affirmed the dismissal of a contest complaint where the contestees presented evidence of gold recovery by suction dredge. The Board found that contestees' evidence overcame the Government's prima facie showing of lack of discovery of a valuable mineral deposit. The Board stated, commenting on the vague nature of contestees' evidence: "However, the Government's evidence is even more deficient, since it made no attempt to take samples from the claim by means of a suction dredge." Id. at 351.

The Forest Service sought reconsideration of the Williams case arguing that there can be no valid mining claim in a streambed because any gold in a stream is not found in a "deposit." It also argued that suction dredging is not legitimate mining.

In an order dated December 3, 1982, the Board denied the petition, rejecting the contentions of the Forest Service. The Board stated:

> "Placer mining" is defined as follows in A Dictionary of Mining, Mineral, and Related Terms:
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> > placer mining. a. The extraction of heavy mineral from a placer deposit by concentration in running water. It includes ground sluicing, panning, shoveling gravel into a sluice, scraping by power scraper and excavation by dragline. Nelson.
> >
> > b. Extracting the gold or other mineral from placers, wherever situated -- in dry channels and in channels for the time filled with water. It does not make the process any the less placer mining that the mineral is found in deep channels, in navigable streams, or in estuaries or creeks and rivers where the sea ebbs and flows.
>
> This Dictionary defines "deposit" as "anything laid down," and "matter left by the agency of water."
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> The record showed that contestees were removing mineral material laid down in the stream bed, concentrating it, and

apparently removing enough gold to meet their expenses. The "deposit" consisted of the material laid down in the stream bed by the water. The contestees were removing the material, not the water itself, as Ball testified. The fact that they were mining in an active stream bed did not make the process any less placer mining. Further, the fact that they used a suction dredge (or any other instrumentality) did not make the process any less legitimate, as long as it was economical for them to do so, as measured by the traditional marketability tests.

FS [Forest Service] refers to John H. Wells' definitive source, Placer Examination - Principles and Practice (Field Edition, July 1969), citing his comments on "flood gold deposits" at pages 16-17. We note that Wells' observation, that "[w]ith few exceptions [flood] gold has proven economically unimportant," was made at a time when gold was worth $35 per troy ounce. At the time of the hearing in this contest, gold was worth nearly $500 per troy ounce, and it has been worth as much as $850 per troy ounce. The increase in the value of gold has been so great that the recovery of flood gold may now be economical. In any event, Wells notes that there are a few exceptions to the general rule, and it would be injudicious of us to presume, without any basis in fact, that contestees' operation was not economical. Here, the record contained evidence showing, albeit less than absolutely, that contestees' operation was economical. We reaffirm our decision dismissing the contest.

FS' position that it need not address the economics of suction dredging was evident at the hearing and is now urged upon us as a rule of law. We reject it, and we emphasize that if FS expects to successfully contest the validity of claims such as this one, it must meet its burden of showing, on a case by case basis, that such operations are not economical. It may be necessary for FS to use a suction dredge to take sample tests at the claim in order to so demonstrate.

In any event, FS did not establish that contestees were removing "flood gold." The record contained no evidence that the geological situation described by Wells in his discussion of "flood gold" existed, or that other conditions existed that favored the conclusion that flood gold was being collected. In the absence of evidence of such a showing, we cannot presume that contestees were not actually mining a "river deposit" that had been overlooked because it was within an active stream bed. The record contained evidence showing that no concentrations were present on the banks of the stream, but it did not deal adequately with the stream bed itself. We do not comment on the extent to which such concentrations may exist; we simply hold that it is part of contestant's obligation to address this issue. [Footnote omitted].

(Order at 2-3).

It was clear error in the present case for the Government mineral examiner to refuse to sample from appellant's dredge. Appellant's dredge was available. Samples easily could have been taken; however, they were not. I would find that where a mining claimant directs the Government mineral examiner to what the claimant considers as his discovery area, and the examiner refuses to sample, and there is no legitimate basis for that refusal, the Government has not established a prima facie case of lack of discovery of a valuable mineral deposit.

In this case, however, appellant did not make a motion to dismiss at the completion of the Government's case. Appellant proceeded to present his evidence. In such a situation that evidence must be considered as part of the entire evidentiary record and weighed in accordance with its probative value. Therefore, even if the Government fails to make a prima facie case, or if its prima facie case is weak, any evidence presented by the mining claimant which supports the Government's charges may be used against the claimant, regardless of the defects in the Government's case. United States v. Taylor, supra at 23-24, 88 I.D. at 73, and cases cited herein.

In this case the evidence presented by appellant, which included evidence of samples taken from the dredge, failed to establish the existence of a valuable mineral deposit. Appellant's unsupported statements concerning amounts and values of gold recovered from this and other claims cannot serve to establish a discovery. The Administrative Law Judge properly declared the claim null and void.

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Bruce R. Harris
Administrative Judge